IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 618 of 1981
WITH
CROSS OBJECTIONS NO. 1 of 2006
WITH
CROSS OBJECTIONS NO. 2 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BANASKANTHA DIST.CO.OP.MILK PRODUCERS UNION LTD. - Appellant(s)
Versus
PRAJAPATI JAYANTIBHAI BABABHAI & 2 - Defendant(s)

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Appearance :
MR SK JHAVERI for Appellant(s) : 1,
MR DHARMESH SHAH for Defendant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5
NOTICE SERVED for Defendant(s) : 2,
MR PV NANAVATI for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 28/11/2006

ORAL COMMON JUDGMENT :

The appellant has approached this Court under section 110-D of the Motor Vehicles Act, 1939 [hereinafter referred to as 'the Act'] to challenge the judgment and award made by the Motor Accident Claims Tribunal [Main] Banaskantha District at Palanpur dated 24th September, 1980 passed in M.A.C. Petition No. 79 of 1979. By the said judgment and award the Tribunal has directed the appellant as well as respondent no. 3 to satisfy the award whereby the original claimant has been awarded a sum of Rs.1,32,250/= by way of compensation for the injuries received by him in a vehicular accident on 21st November, 1978. On that day the claimant, as an employee of the appellant, was travelling in a trolley/trailer attached to a tractor owned by the appellant. The tractor bore the Registration No. GTY 4768; whereas trailer bore the Registration No. GTY 6089. The trolley was loaded with gunny bags containing powder which were being transported from one godown to the other of the ownership of the appellant. The claimant was sitting on the heap of the gunny bags. It was averred by the claimant before the Tribunal that the driver of the tractor, who is respondent no. 2 herein, drove the vehicle at an excessive speed and in a rash and negligent manner. As a result of such driving, while negotiating a curve, the driver lost control over the vehicle and it toppled down along with the trailer. The claimant fell on the ground and was buried underneath the gunny bags containing powder. He received serious injuries. He was removed to hospital for treatment. During treatment it was learnt that his limbs below the waist were paralyzed due to serious injury to spinal cord. He,

therefore, filed petition before the Tribunal claiming a sum of Rs.1,50,000/= on various grounds. According to the claimant, he was working with appellant on daily wage basis and received Rs.5/- per day. His monthly income was Rs.150/=. He also claimed different amounts under different heads such as pain, shock & suffering, medical expenses, special diet, etc.

2. The claim was resisted by the appellant by filing written statement at Exh. 17. In the written statement it was contended by the appellant that the monthly income of the claimant was not Rs.300/=. The appellant also denied that the claimant had suffered paralysis of the limbs below the waist. It was also contended that there was negligence on the part of the claimant himself since without any support he was sitting on the heap of the gunny bags and that too against the instruction of the management.

2.1. So far the Insurance Company i.e respondent no. 3 is concerned, it resisted the petition by filing written statement at Exh. 34. The Insurance Company denied that the claimant was being carried in the vehicle as an employee of the insured or by virtue of any contract of employment and, therefore, the Insurance Company was not liable. It also contended that its liability was only to the extent of the liability arising under the Workmen's Compensation Act [hereinafter referred to as 'the WC Act']. The Insurance Company, therefore, prayed that in the event of claimant succeeding in the

petition, the Tribunal may not saddle the Insurance Company with any liability beyond the liability arising under the WC Act.

2.2. The Tribunal, on the basis of the evidence produced before it, oral as well as documentary, arrived at conclusion that since the accident occurred in the premises of the appellant, there was no doubt that the driver was guilty of driving the vehicle in negligent manner, since there was no scope of any collision between the two vehicles. According to it, accident took place solely due to negligence of the driver of the vehicle and there was no contributory negligence on the part of the claimant. The Tribunal also assessed the amount payable to the claimant by way of compensation and directed the insured as well as Insurance Company to satisfy the award. It, however, fixed the liability of the insurer to Rs.50,000/= only and directed the appellant to pay the balance amount by way of compensation to the claimant. It is this award which is now being challenged by the appellant in this appeal.

3. I have heard Mr. SK Jhaveri, learned advocate appearing for the appellant and Mr. Dharmesh Shah, learned advocate appearing for the original claimant. Mr. Jhaveri has submitted that the petition itself is not maintainable because the accident has taken place in a private premises and not in a public place. He has further submitted that the appellant being employer of the claimant and accident occurred while the claimant was travelling in the vehicle

in the course of his employment, the liability of the appellant was limited only upto liability arising under the WC Act. He has further submitted that inspite of strict instruction to the claimant not to travel by such vehicle, he sat on the top of the gunny bags loaded in the trailer and because of his negligent act, the accident occurred. According to Mr. Jhaveri, the claimant is also responsible for contributory negligence.

3.1. As against that, Mr. Dharmesh Shah, learned advocate for the claimant, has submitted that there was no negligence on the part of the claimant and the sole negligence is that of driver of the vehicle. According to him, the accident occurred while the goods of the appellant were being transported from one godown to other and, therefore, it cannot be said that the accident did not occur in a public place. According to him, considering the fact that the claimant had sustained very serious injuries resulting into paraplegic condition the compensation awarded by the Tribunal was on lower side. He has stated that for claiming higher compensation the claimant has also preferred cross objections.

4. Mr. Jhaveri has also taken me through the record and proceedings of the case and in particular the oral evidence of the witnesses to substantiate his submissions. It appears that the claimant was working as temporary employee and he was employed by order dated 20th October, 1978 as a Helper.

Evidence of one Vahiyuddin Kalumiya Shaikh Exh. 91 shows that he was employed on temporary basis upto 31st March, 1979 on a daily wage of Rs.5/=. The accident took place on 21st November, 1978 i.e exactly one month and one day after his joining the employment. It also appears that he was travelling in the offending vehicle i.e a trailer attached to the tractor in which the bags containing powder were loaded for being transported from one godown to the other when the accident occurred. Distance between the two godowns appears to be 2 to 4 furlongs. There is no dispute that the claimant was sitting on the heap of the bags when the accident occurred. There is also no dispute that because the tractor along with the trailer turned turtle, the gunny bags fell on him and he received serious injuries to various limbs including the spinal cord rendering him totally immobile. Now it is to be seen whether claimant had contributed towards the accident. Say of the claimant, who has been examined at Exh. 78/1 is that he was sitting in the trailer along with 2 to 4 other persons. He has further stated that while he was travelling in the trailer, it all of a sudden turned turtle because of the rash and negligent driving of the driver. He has stated that while taking a turn at a curvature, the vehicle toppled down and he fell on the ground and unfortunately got buried underneath the gunny bags. It appears that his co-passengers also received injuries, but their injuries were not serious. He has further stated that he was taken to the hospital for treatment and since his spinal cord was damaged, he developed paraplegic condition and was rendered completely bed-ridden. The record shows that the claimant, at the

relevant time was 21 years and was a married person. It also transpires that after the proceedings before the Tribunal were over and award was made, he expired and his heirs have been brought on record of this appeal. The claimant has given details with regard to the treatment and the expenses which he had to bear for the treatment and has stated that because of the injuries, he had lost the job. According to him, had he continued in the employment and had he become permanent, he would have received salary of Rs.450/= p.m. In the cross-examination, suggestions have been made to the effect that his condition had improved and he was able to move around but the same have been denied. He has denied that he was not required to spend any amount for medical expenses. He has also denied that there was any negligence on his part since he had not heeded to the instructions given to him by the supervisor.

4.1. Medical Officers who treated the claimant have been examined before the Tribunal and they have adequately deposed about the injuries suffered by the claimant and the resultant effect on him. Thus, the fact regarding the claimant sustaining serious injuries which rendered him permanently disabled person is duly proved. However, Mr. Jhaveri's submission is that if injuries were suffered by him only because of his own negligence and not that of the driver, the appellant cannot be held liable to pay compensation. This submission cannot be accepted at all. The facts reveal that the vehicle had turned turtle while negotiating a curve. It is in evidence that the

driver was driving the vehicle at excessive speed and in a rash manner. He ought to have taken the care to slow down the vehicle so as to safely negotiate the curve. However, the evidence shows that the driver did not exercise due care and he continued to drive the vehicle with speed, evenwhen the trailer attached to the tractor was fully loaded. Driver i.e respondent no. 2 has not stepped into the witness box to give his version about the accident. Hence, the version given by the claimant and witness Rasikbhai Ranchhodbhai Gurjar Exh. 53 has to be accepted. If this be so, no fault can be found with the claimant and it cannot be said that because of his negligence, he received injuries. It is understandable that if he had fallen down from the heap of the gunny bags while the tractor was in motion and negligence could have been attributed to him. But here that is not the case. He fell on the ground only because the tractor and trailer turned turtle. Therefore, I do not find that any error has been committed by the Tribunal in holding respondent no. 2 guilty of driving the vehicle in negligent and rash manner.

5. The next contention of Mr. Jhaveri is that the petition itself is not maintainable because the accident took place in a private place and not in a public place. This contention of Mr. Jhaveri also cannot be accepted. First of all it will be necessary to see whether the fact that the accident took place in a private place is on record. The evidence of witness Rasikbhai Ranchhodbhai Gurjar shows that the goods belonging to the appellant were required to be

shifted from one godown to the other by tractor. Like the claimant, this witness was working as labourer for loading the goods in the tractor. He was also travelling in the said vehicle. According to him, the other godown where the goods were to be transferred was at a distance of about four furlongs. Of-course, he has stated that the tractor turned turtle near the urinal of the dairy. However, he has not stated whether the urinal was within the compound or outside it. Considering the distance between two godowns, it can safely be presumed that the other godown was outside the compound of the dairy. No effort is made either by the appellant or by other parties contesting the claim to get a clarification whether the scene of occurrence was situated within the premises of the appellant. In the claim petition also it is stated that the tractor was transferring the goods from one department to other department of the dairy. However, this fact is clarified in the evidence by the witnesses that it was transfer of goods from one godown to other. In the circumstances, benefit has to go to the claimant.

5.1. Apart from that whether such contention can be raised by the insured, is required to be seen. Words *'public place'* are defined in section 2 (24) of the Act as under :-

> "(24) "public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set

down by a stage carriage;"

Section 95 of the Act deals with requirement of policies and limits of liability. Sub-section (1) clause (b) sub-clause (ii) incorporates words 'public place'. Sub-section (1) reads as under :-

"**95. Requirements of policies and limits of liability.-**

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) is issued by a person who is an authorised insurer or by a cooperative society allowed under Section 108 to transact the business of an insurer, and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) xxx xxx xxx xxx xxx

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place."

Thus section 95 prescribes that the insurance company will be liable to insure a person or classes of persons against the liability which may be incurred by him in respect of death or bodily injury to any person arising out of the use of the vehicle in the public place. Therefore, it is obvious that the insurance company is not required to insure the person against the liability which may be incurred by such person in respect of death or bodily injury of a third party in a private place. Therefore, this defence can be available to the insurance company alone.

But the insured cannot have any benefit of the same. When the insurance company has been absolved from its liability, the insured is liable to satisfy the award and pay compensation. That is the law laid down by the different Courts including the Apex Court over the years.

5.1. There is one more reason also to discard the submission of Mr. Jhaveri and it is that appellant is dairy where the supply of milk is made from different places. This fact can be seen from the evidence of witness Vahiyuddin Kalumiya Shaikh and during the period between October and March, to tackle the supply of milk, additional employment is also required to be made. The name of the appellant itself suggests that it is Milk Producers' Union established on cooperative basis for the District of Banaskantha. Therefore, judicial notice also can be taken of the fact that people on large scale might be visiting the same with their vehicles or on foot for supply of milk. If that be so, it can safely be stated to be a *'public place'* within the meaning of section 2 (24). In the decision rendered by the Division Bench of this Court in the case of Prakash Chemicals Pvt. Ltd. v/s. Krishna Singh Sata Singh Kashiyara reported in 1993 ACJ p.218 it has been held as under :-

> “29. ..... With the increase in industrialisation and with the increase in commercialisation in this country, such big establishments are fast coming up and, of necessity, quite a large number of members of the public are, day in and day out, required to enter the campus of such large

establishments. May be, for security reason or for some other reason, the establishments might regulate the entry of public into their premises... If such places are, these days, held to be not 'public place' within the meaning of the expression as used in the relevant provisions of the Act, the whole object underlined the scheme of compulsory insurance under Chapter VIII of the Act would be frustrated. When we talked of entry of large number of members of public in such establishments, we include therein entry of vehicles. As could be seen from the facts of the present case, and also as could be seen from the facts of the case decided by the Bombay High Court, though the premises of IPCL and TELCO may be private premises, many vehicles ply therein; roads are laid down, electric poles are laid down and number of members of public either on foot or by means of vehicles have ingress to and egress from such premises. If, on a narrow construction of the expression 'public place', such establishments or premises of such establishments are kept out of the purview of the expression 'public place', in quite a large number of cases the scheme of compulsory insurance would be frustrated."

Similar view has been taken by the Madhya Pradesh High Court in the case of Narsingh v/s. Nalkishan reported in 1988 ACJ p. 288. It has observed as under :-

"5. The sole question which arises for consideration in this appeal is whether the printing press, where the accident took place, can be said to be a "public place" within the meaning of section 95 (1)(b) (ii) of the Motor Vehicles Act. "Public place", as defined by section 2 (24) of the Motor Vehicles Act, 1939, means "a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and it includes any place or stand at which passengers are picked up or set down by stage carriage." The words "other place" occurring in the

definition are significant in their connotation and should be given a wide import and interpretation. 'Public place' is a place where the public can and do have access. It was urged by the respondents that the compound of the printing press is a private place. Even user of a private place and access by public can be interpreted as a 'public place' within the meaning of section 2 (24) of the Act. It has come in evidence that trucks have access to the campus of the compound of the printing press and the accident itself has in fact occurred due to a dash by the truck. The mere fact that the compound or the campus of the press is owned by an individual would not make it a 'private place'. It is not necessary that the place must be the public property.

6. Learned counsel for the appellants pointed out that in the compound itself there was an office of the Text Book Corporation and public at large cannot be denied access to such an office. In this view of the matter, the place of accident is held to be a 'public place'. [See Lanka Sarmma v. Rajendra Singh, 1984 ACJ 198 (A.P.)]. The respondent – insurance company is, therefore, held to be liable for paying the compensation to the claimants – appellants jointly and severally with other two respondents."

Thus, it is a 'public place' within the meaning of section 2 (24) of the Act and the accident in question can be said to have occurred in a 'public place'.

6. The last contention of Mr. Jhaveri is that the liability of the appellant is only to the extent of the liability arising under the WC Act and not more. This submission of Mr. Jhaveri cannot be accepted. It is not in dispute that the claimant was an employee of the appellant on the date of accident. He

was travelling, on the relevant date, in the offending vehicle in the course of his employment, when he sustained injuries due to negligent act of the driver i.e another employee of the appellant . Hence, the appellant is not only liable for the act of his employee, namely driver, under tort but it is also liable to pay compensation to its employee i.e the claimant under the WC Act. Both these liabilities are distinct and separate. However, section 110-AA of the Act gives option regarding claims for compensation in certain cases. It reads as under :-

> "**110-AA. Option regarding claims for compensation in certain cases.-** Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923), where the death of or bodily injury to any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923 (8 of 1923) the person entitled to compensation may, without prejudice to the provisions of Chapter VII-A, claim such compensation under either of those Acts but not under both."

Therefore, a person is entitled to claim compensation either under the WC Act or under the Act, but not under both. In the instant case, the claimant has approached the M.A.C. Tribunal since he received injuries in a vehicular accident on account of the negligent act of the driver of the appellant. It is, therefore, action in tort and the compensation can be awarded accordingly and not under the WC Act. The Division Bench of this Court in the case of Nasimbanu v. R.B. Ahir reported in 2005 (2) G.L.R. At page 1476 has laid down that amount awarded under the WC Act against the employer could not

be deducted from the compensation payable by tort-feasor under the M.V. Act. The Division Bench has further held that the employer under the WC Act is statutorily bound to pay compensation for bodily injury or death of a person being his master. This is a separate relationship and liability. It is true that in the present case, the tort-feasor as well as the master are the same, but when the claimant has exercised the option under section 110-AA of the Act and has chosen to pursue the remedy under tort, the limit of compensation prescribed under the WC Act, will not be of any relevance. So far the insurance company is concerned, the matter stands slightly on different footing since under section 95 itself it has been prescribed that the insurance company will be required to insure such person only to the extent of liability arising under the WC Act, if no additional premium is paid. In other words, the Act policy liability of the insurance company is limited to the one prescribed under the WC Act and not beyond it. However, so far the insured is concerned, the liability is not limited and it has to satisfy the rest of the award i.e the compensation payable to the claimant over and above the limited compensation which is payable by the insurance company. The Division Bench of the Bombay High Court in a judgment rendered in the case of National Insurance Co. Ltd. v. Gonti Eliza David reported in 1984 ACJ p. 8, has held as under :-

> "12. The cleavage of judicial opinion in this regard can be attributed to the difficulty in co-relating the language of the proviso to sub-section (1) of section 95 with that in sub-section (2) of that section. The former

seems to tell the insurer and the owner : “as regards third party risk, it will be enough compliance of the statute, if you take out a policy which will cover the liability under the Workmen's Compensation Act.” Sub-section (2) on the other hand gives a confusing mandate : “there is an outer limit of one lac of rupees as respects the liability incurred as a result of an accident but that liability will include a liability arising under the Workmen's Compensation Act also.” The use of an inclusive definition in drafting sub-section (2) seems to suggest that the liability incurred in respect of an accident would embrace not only the one arising under the Workmen's Com Act but also something more. Needless to say, that other species of liability would be the one arising under common law of Tort.”

In the decision rendered by the Kerala High Court in the case of Ayisha Beevi v. Kalidasan reported in 1987 ACJ p.584, it has been held that the Tribunal is empowered to award in excess of liability satisfied under the WC Act in case of death of an employee since section 95 does not impose any limit. After quoting the relevant portion of section 95, it has observed as under :-

“4. It is evident that the double negative used in the proviso makes it obligatory that the liability under the Workmen's Compensation Act, 1923 in respect of the death or bodily injury of an employee being carried in the goods vehicle is a liability which has to be insured. It is also clear that unless otherwise shown, the extent of that liability is the same as the extent provided under the Workmen's Compensation Act.

5. Counsel for the appellant submitted that the measure of damages in the case of an employee who is covered by the provisions of the

> Workmen's Compensation Act is provided by the amount payable thereunder and no more than that can be claimed or awarded in the case of death or bodily injury of such a person. We do not find anything in section 95 (1) or any other provision in the Act which imposes, by express terms or by necessary implication, any limitation on the extent of general damages which can be claimed by such an employee. Counsel was right in conceding that there is nothing in the general law which imposes any such restriction. We are, therefore, not in a position to accept the first submission that the amount of compensation awardable in the case of death or bodily injury of an employee covered by the Workmen's Compensation Act must be limited to the one payable thereunder."

It is, therefore, obvious that so far the insured is concerned, he has to satisfy the liability which may arise under the tort, if the insurance company is absolved from satisfying such liability. In the instant case, the Tribunal has held that the insurance company, since no additional premium is charged, is required to pay compensation to the extent of Rs.50,000/= only. Therefore, the balance amount of the compensation has to be borne by the appellant being the insured. The appellant cannot take shelter under the provisions of section 95 of the Act and that of the WC Act and say that its liability is limited. In view of the same, this contention of Mr. Jhaveri also cannot be allowed.

7. This brings me to the cross objections filed by the insurance company. So far as the case of the insurance company that the claimant was sitting in a tractor is concerned, it is de-hors the fact and completely belied by

the evidence of eye witnesses including the victim himself. Further, in the facts of the case, there is no scope for it to argue that trailer was not insured with it and it was not liable to satisfy the award. The Tribunal has found that the insurance company has not charged additional premium and provided wider coverage to the insured and hence it can be called upon to discharge only the liability arising under the WC Act. This finding appears to be just and proper. Therefore, there is no need to accept the Cross Objections and grant any further relief to the insurance company.

8. Now I will consider the Cross Objections filed by the claimant. This is a case of personal injury. The Tribunal has awarded compensation under various heads which has been duly narrated in para. 15 of its judgment. It has awarded Rs.45,000/= for pain, suffering and loss of amenities. For loss of earning capacity, for future attendance charges and for future medical charges, on each count the Tribunal has awarded Rs.27,000/=. However, as stated above, the original claimant is no longer alive and he has expired. The total claim that has been granted by the Tribunal is Rs.1,32,250/= against the claim of Rs.1,50,000/=. In the facts and circumstances of the case and particularly when the original claimant is no more, there is no need to enhance it. Hence, the Cross Objections of the claimant-respondent no. 1 are also dismissed.

The net result is that the appeal is dismissed and so are the Cross

Objections.

[Akshay H Mehta, J.]

* Pansala.